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west virginia department of environmental protection

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Executive Office  
601 57th Street, Southeast  
Charleston, West Virginia 25303  
Phone: (304) 926-0440  
Fax (304) 926-0446

Earl Ray Tomblin, Governor  
Randy C. Huffman, Cabinet Secretary  
[www.dep.wv.gov](http://www.dep.wv.gov)

October 23, 2012

Gregory E. Peck, Chief of Staff  
USEPA, Office of Water  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

Shawn Garvin, Administrator  
USEPA, Region 3  
1650 Arch Street, Mail Code 3RA00  
Philadelphia, PA 19103-2029

Re: WV1029690 - Consol of Kentucky, Buffalo Mountain Project

Dear Mr. Garvin and Mr. Peck:

I write regarding USEPA's specific objection to the above-referenced NPDES permit. Over the last several months, my permitting staff has attempted to work with USEPA and the permit applicant to resolve the outstanding issues associated with this permit. My understanding is that those efforts have successfully resolved each of USEPA's specific objections to the NPDES permit, except for one: USEPA's insistence that the permit include effluent limits for conductivity or one of its surrogates based on the same reasoning employed in USEPA's July 21, 2011 permitting guidance (*i.e.*, the "Final Guidance"). As you are aware, however, the Final Guidance was set aside on July 31, 2012, by Judge Reggie Walton of the U.S. District Court for the District of Columbia as an unlawful exercise of USEPA's authority. Accordingly, I respectfully request that USEPA immediately withdraw its specific objection to this permit — the only roadblock preventing my Department from issuing the NPDES permit.

This issue dates from January 20, 2012, when USEPA issued its specific objection to the above-referenced draft NPDES permit. This specific objection listed four grounds of objection that were identified as items 1A, 1B, 2 and 3. In verbal communications since this specific objection was lodged, representatives of USEPA have acknowledged that USEPA's objections 1A, 2 and 3 have been satisfied, leaving only objection 1B. USEPA's specific objection 1B is USEPA's demand that the permit include an effluent limitation for conductivity, total dissolved solids, sulfate, or bicarbonate because, in USEPA's opinion — and as set forth in the now-vacated Final Guidance — such a limitation is necessary for implementation of the State's narrative water quality standard for protection of the aquatic ecosystem.

At a meeting on June 14, 2012, USEPA representatives suggested to the State and the applicant that USEPA's objection 1B could be satisfied by reconfiguring the permit to mimic the terms of the

Promoting a healthy environment.



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recently issued NPDES permit for the Canebrake mining operation. The terms of the Canebrake NPDES permit were negotiated with USEPA by a permit applicant that was highly motivated to obtain a permit and willing to agree to any demand USEPA made of it. The State believes the terms of the Canebrake permit and USEPA's specific objection 1B to this permit exceed what is necessary under the State's interpretation of its narrative water quality standard and represent an unlawful attempt to implement the Final Guidance, which has been set aside by Judge Walton as "an unlawful agency action." See *Nat'l Mining Ass'n v. Jackson*, Case No. 10-cv-1220 (D.D.C. July 31, 2012). A copy of Judge Walton's judgment order is enclosed for your reference.

Despite the State's belief that USEPA's objection 1B, as well as the terms of the Canebrake permit, exceed what is necessary under the State's interpretation of its narrative water quality standard, the State resubmitted a draft NPDES permit for the Buffalo Mountain Project on October 16, 2012, at the applicant's request, in an attempt to resolve USEPA's concerns. As requested by USEPA at the June meeting, the terms of this latest draft permit represent the applicant's attempt to mimic the Canebrake NPDES permit so that USEPA's objection 1B could be satisfied.

Despite these repeated efforts at conciliation and resolution on the part of the State and the permit applicant — including responding to USEPA's express instructions that it mimic the Canebrake permit — USEPA has refused to withdraw its specific objection to the draft NPDES permit. EPA's continued specific objection is the *only* impediment preventing the State from issuing this permit. In addition, USEPA's continued efforts to interject itself in the Section 404 permit process exceed its legitimate authority under the law and also likely contravene Judge Walton's prior summary judgment ruling concerning the proper role for USEPA in the Section 404 process. USEPA's stonewalling on these permit issues frustrates the State's regulatory resources and threatens the State's economic interests.

In sum, I am formally requesting that USEPA *immediately* withdraw its specific objection to the Buffalo Mountain permit, so the State may issue it and the applicant may proceed with the least possible disruption to its business plans. Please inform me immediately if USEPA will not withdraw its specific objection. If not, the State will take whatever action it deems appropriate, including returning to court, to enforce Judge Walton's judgment.

Sincerely,



Randy C. Huffman  
Cabinet Secretary

enclosure

cc: Colonel Steven McGugan, U.S. Army Corps of Engineers, Huntington District

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

NATIONAL MINING ASSOCIATION, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
LISA JACKSON Administrator,	)	Civil Action No. 10-1220 (RBW)
U.S. ENVIRONMENTAL PROTECTION	)	Civil Action No. 11-0295 (RBW)
AGENCY, et al.,	)	Civil Action No. 11-0446 (RBW)
	)	Civil Action No. 11-0447 (RBW)
Defendants,	)	
	)	
SIERRA CLUB et al.,	)	
	)	
Defendant-Intervenors.	)	
	)	

**ORDER**

For the reasons expressed in the Court's Memorandum Opinion of this same date, it is hereby

**ORDERED** that the plaintiffs' motion for partial summary judgment is **GRANTED**. It is further

**ORDERED** that the federal defendants' motion for partial summary judgment is **DENIED**. In accordance with the Administrative Procedure Act, 5 U.S.C. § 706(2) (2006), it is further

**ORDERED** that the Final Guidance, as an unlawful agency action, is hereby set aside. It is further

**ORDERED** that, as this is a final, appealable Order, the defendants' June 1, 2012 Motion for Entry of Final Judgment is **DENIED AS MOOT**. Finally, it is further

**ORDERED** that this case is **CLOSED**.

**SO ORDERED** this 31st day of July, 2012.

REGGIE B. WALTON  
United States District Judge